Kluwer Arbitration Blog

2024 PAW: The Rise of Arbitration in Asia

Youssef Ben Khamsa · Friday, April 12th, 2024

Paris, amidst its annual Arbitration Week in 2024, saw the convergence of arbitration practitioners and enthusiasts at the Hyatt Paris Madeleine for the conference "The Rise of Arbitration in Asia," a testament to the region's expanding arbitration influence, convened by Rajah & Tann Asia.

The discussion was marked by the presence of distinguished legal professionals, each poised to contribute to a multifaceted discussion. Kelvin Poon SC, Deputy Managing Partner and Head of the International Arbitration practice of Rajah & Tann LLP Singapore, was joined by Tan Chuan Thye SC and Vanina Sucharitkul of the same firm, bringing their collective experience in Asian legal practice and international arbitration. They were joined by International Counsel, Ma Tianyu, also from Rajah & Tann as well as guest speakers—Mariel Dimsey of CMS (Managing Partner of the Hong Kong Office) and former Secretary-General of the Hong Kong International Arbitration Centre ("HKIAC"), Michael Polkinghorne, Partner of White & Case Paris, Bernard Hanotiau of Hanotiau & Van den Berg and Court Member of the Singapore International Arbitration Centre ("SIAC"), and Christine Artero of Arbitration Chambers, Singapore—who all brought their specialized knowledge and experience to enrich the discourse, promising a comprehensive examination of Asia's arbitration growth.

Evolving Dynamics and Prospects

The panel's dialogue bridged Asia's historical arbitration practices with its current burgeoning role as a key player in the global arbitration market. Each speaker contributed insights into the region's growing position for international dispute resolution, offering a rich, nuanced understanding of the factors propelling Asia to the forefront of arbitration seats globally.

According to the Queen Mary University of London International Arbitration Survey 2021 (the "QMUL Survey"), Singapore for the first time is ranked first alongside London as the most-preferred arbitration seat. Hong Kong is third. Among arbitral institutions, Singapore International Arbitration Centre is second, and the HKIAC third, among most-popular arbitral institution. China International Economic and Trade Arbitration Commission ("CIETAC") is ranked fifth. The popularity of these Asian seats and institutions started to emerge over the course of the last decade, and the speakers weighed in on what they thought were the key ingredients.

Rise of Asian Arbitral Seats

The insights provided by Bernard Hanotiau emphasized the Singaporean government's resolute efforts to foster a pro-arbitration environment on all fronts, marked by a supportive judiciary, the update of legal reforms and exchanges with foreign judiciaries, and investment in the arbitral institution. A traditional Asian Financial center, Hong Kong was one of the earlier jurisdictions to adopt the UNCITRAL Model Law into effect in 1990. In 1994, Singapore gave effect to the UNCITRAL Model Law by enacting the Singapore International Arbitration Act.

Additional barriers that could hinder international arbitration in those days were removed such as withholding tax for foreign arbitrators and the lifting of certain restrictions on foreign counsel and arbitrators participating in international arbitrations. The promulgation of international law firm offices also brought in a mix of legal talents from multiple jurisdictions, paving ways for the two seats to become international arbitration hubs.

Michael Polkinghorne and Mariel Dimsey offered perspectives on strategic infrastructure development, technological and logistical advancements, respectively, that further enhance the attractiveness of Asian arbitral seats. Highlighting the role of Maxwell Chambers in Singapore, Christine Artero detailed how its establishment as a purpose-built one-stop dispute resolution complex has revolutionized the physical space within which arbitration and mediation are conducted. Legislative enhancements, including the early introduction of third-party funding, underscored a regional commitment to fostering an arbitration-friendly atmosphere.

Rise of Asian Institutions

According to the QMUL Survey, a key factor in determining the popularity of a seat is the reputation of the respective arbitral institution.

In fact, in the last decade, the QMUL Survey noted a discernible preference towards the SIAC and HKIAC, eclipsing the traditional preference for some traditional European institutions. These Asian regional institutions have become more user-friendly with varied and competitive fee structures, different levels of case management, and consistent quality standards. Bernard Hanotiau expounded on Asia's proactive, quick-to-innovate and flexible approach. The appeal of these institutions is further bolstered by innovative strides, such as the introduction of expedited procedures and early dismissal mechanisms. This narrative was expanded further by Mariel Dimsey, who discussed the recent reform that makes Hong Kong unique, being the People's Republic of China-Hong Kong Interim Measures Arrangement. This allows a party to a HKIAC-administered arbitration proceeding seated in Hong Kong to apply to a competent Mainland Chinese court for interim measures such as the freezing of assets in relation to the arbitral proceedings. According to Mariel Dimsey, the unique arrangement should serve to grow overall arbitration cases in Asia.

Cross-Cultural Disputes

The complexity of cross-cultural disputes within the arbitration process was explored by various panelists who shared their experiences that underlined the importance of cultural literacy within

arbitration, particularly in interpreting communications and contractual terms and obligations. Bernard Hanotiau spoke on his experience as an arbitrator, noting how the Asian approach to dispute resolution is grounded in less aggressive and more respectful tactics, and is reflective of the region's cultural values.

The panelists highlighted the importance of cultural awareness that can at times be misconstrued in the Western world. For example, a very respectfully written letter does not necessarily mean that the party is not aggrieved or dissatisfied. Some cultures may also have a different understanding of "when" a contract is "concluded." Navigating the intricacies of cross-cultural differences has been a hallmark of international arbitration, where diverse legal traditions and cultural factors permeate the arbitration process. From more nuanced negotiation tactics to a preference for mediation, or other forms of alternative dispute resolution, Asian practices are becoming increasingly accepted. Cultural attributes like "saving face," deference, respect for seniority, and non-confrontational attitudes may also play pivotal roles, requiring both arbitrators and counsels to adapt their approach and understanding to the subtlety of the Asian dispute resolution paradigm.

Asia's Surge in Outbound Investments

Panelists noted that the landscape of Investor-State Dispute Settlement ("ISDS") is witnessing a shift with Asia's increase in outbound investments. China's and Japan's Foreign Direct Investment ("FDI") outflows have surged (with China doubling its FDI outflow in 10 years), and continuous conclusion of intra-Asian bilateral investment treaties ("BITs") such as the recent Singapore-Indonesia BIT. On the other hand, the EU is witnessing a steady decline in outbound FDI over the past decade. This economic dynamism is mirrored in the realm of ISDS, where statistics show an uptick in Asian investors as claimants and intra-Asia ISDS cases, and a preference for Asian seats for ISDS matters have been observed. While the future is uncertain, the advent of the Singapore Mediation Convention provides an alternative to ISDS critics, potentially reducing the reliance on more adversarial ISDS proceedings.

Bernard Hanotiau highlighted the trend of Asian entities increasingly acting as claimants and noted that some countries such as Thailand are opposed to the European Investment Court. This illustrates that there is still a preference for ISDS in certain Asian jurisdictions.

Christine Artero acknowledged that Asian venues could be poised to gain prominence as growing venues for ISDS proceedings with the Permanent Court of Arbitration opening its office at Maxwell Chambers and ICSID regularly holding hearings there.

Chuan Thye Tan SC also offered commentary on the *Philip Morris v. Australia* case, where the tribunal rendered a decision on the seat of arbitration being Singapore. Effectively, the tribunal considered the the location of the subject matter and proximity of evidence as factors in favour of Singapore over London.

Reflection for Future

Vanina Sucharitkul combined the panel's insights to offer a forward-looking reflection on Asia's burgeoning impact on international arbitration as inter-continental trade increases. The consensus

pointed towards an era where Asian arbitration practices and venues may increasingly define the norms of international dispute resolution, fueled by innovative approaches and adaptability to the complexities of global legal practices.

Conclusion

The panelists, through their elaborate discussions, reinforced confidence among the attendees about the future of arbitration in Asia. It seems clear that there is a deeper understanding and wide recognition of Asia's arbitration landscape. The panel's collective insights projected a positive outlook where arbitration in Asia will not only continue to rise but also play a significant role in shaping the contours of international arbitration.

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